No. 45918-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sonja Hutchens,

Appellant.

Clark County Superior Court Cause No. 13-1-01009-7

The Honorable Judge John F. Nichols

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Hutchens was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.

2. Defense counsel provided deficient performance by giving Ms. Hutchens inaccurate legal information

3. Ms. Hutchens was prejudiced by her attorney's deficient performance.

> **ISSUE 1:** Defense counsel provides ineffective assistance by failing to research the relevant law and by giving his/her client inaccurate legal information. Here, Ms. Hutchens gave up her right to a lesser-included instruction based on her attorney's inaccurate legal advice. Was Ms. Hutchens denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?

4. The court's instructions violated Ms. Hutchens's Fourteenth Amendment right to due process.

5. The court's instructions did not make the self-defense standard manifestly clear to the average juror.

6. The court erred by refusing to instruct the jury that Ms. Hutchens had no duty to retreat when attacked.

> **ISSUE 2:** The court's instructions must make the self-defense standard manifestly clear to the average juror. Here, the court refused to instruct the jury that Ms. Hutchens had no duty to retreat even though the state's theory was that she should have withdrawn rather than acting in self-defense. Did the court's instructions violate Ms. Hutchens's Fourteenth Amendment right to have the jury accurately instructed on the self-defense standard?

7. The trial court erred by imposing attorney fees in the amount of $1000.

8. The imposition of attorney fees without a finding that Ms. Hutchens has the present or future ability to pay violated her Sixth and Fourteenth Amendment right to counsel.

> **ISSUE 3:** A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability

to pay. Here, the court imposed $1000 in attorney fees without finding that Ms. Hutchens had the ability to pay. Did the trial court violate Ms. Hutchens's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sonja Hutchens and Jill Earnhardt had a mutually antagonistic relationship. RP 309-13, 320-23, 326-28. Ms. Hutchens believed that Earnhardt had abused her son during a football trip. RP 268-72. The two argued at their children's sports events. RP 309-13, 320-23, 326-28.

During a middle school track meet, Ms. Hutchens saw Earnhardt sitting her in car. RP 331, 354, 424. Hutchens approached the car to talk to Earnhardt. RP 331, 357, 424. According to Ms. Hutchens, when she got to the car, Earnhardt opened the door and hit Ms. Hutchens, causing her to stumble backwards.[1] RP 332, 360, 425.

The two women began fighting physically.[2] RP 334, 361, 426. Ms. Hutchens ended up at least partially inside Earnhardt's car. RP 426. After a few moments, Ms. Hutchens's fiancé pulled her out of the car and Earnhardt came with her.[3] RP 362, 427. Once outside of the car, Ms. Hutchens got in the final blow, hitting Earnhardt in the face. RP 362-63.

An emergency room doctor testified that Earnhardt's x-ray showed a nose fracture. RP 236. Ms. Hutchens presented evidence that the

[1] Earnhardt testified that Ms. Hutchens opened the car door. RP 171. None of the other witnesses for the state were certain who had opened the door. RP 108, 113-31.

[2] Earnhardt testified that she was not fighting back. RP 172-73.

[3] Earnhardt testified that Ms. Hutchens pulled her out of the car. RP 173.

doctors could not determine whether the fracture was a result of the fight or an old injury. RP 244, 495.

The state charged Ms. Hutchens with second-degree assault and first-degree burglary. CP 4-5.

Mid-trial, defense counsel informed the court that he was going to request a jury instruction on the lesser-included offense of fourth degree assault. RP 483-84. Ms. Hutchens submitted a proposed jury instruction on fourth degree assault. CP 241-42.

On the last day of trial, however, Ms. Hutchens's attorney withdrew the request for the lesser-included instruction. RP 547-69. He explained that Ms. Hutchens had decided to forego the instruction. RP 548. The attorney noted on the record the reason for her decision. He said he had explained that she could not be convicted of first degree burglary if she was not also convicted of assault. RP 548. As a result of this information, Ms. Hutchens decided to pursue an "all or nothing" strategy on the felony assault charge. RP 547-49. This was due to her attorney's advice that if she was not convicted of the assault, she could not be convicted of the burglary. RP 547-569.

The court instructed the jury regarding self-defense. CP 259-61. The court refused, however, to give the following portion of Ms. Hutchens's proposed instructions:

> The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be 'not more than necessary,' the law does not impose a duty to retreat. Retreat should not be considered by you as a 'reasonably effective alternative.'
> CP 230, 261; RP 541-45.

In closing, the prosecutor argued that Ms. Hutchens's use of force was not reasonable because she could have walked away from the conflict. RP 581-82, 593.

The jury found Ms. Hutchens guilty of both charges. RP 689-90.

The court ordered Ms. Hutchens to pay $1000 in fees for her court-appointed attorney. CP 356. The court also found Ms. Hutchens indigent. CP 349. The court did not make a finding regarding whether Ms. Hutchens had the present or future ability to pay legal financial obligations. CP 354.

This timely appeal follows. CP 348.

ARGUMENT

I. MS. HUTCHENS WAS DEPRIVED OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001) (Fleming I); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Ms. Hutchens's defense attorney provided inaccurate legal advice which caused her to forego her unqualified right to have the jury instructed on an applicable lesser included offense.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

The conduct of a reasonable attorney "includes carrying out the duty to research the relevant law." *Kyllo*, 166 Wn.2d at 862. Defense counsel provides ineffective assistance by providing his/her client with legal misinformation. *See e.g. State v. A.N.J.*, 168 Wn.2d 91, 116, 225 P.3d 956 (2010); *State v. S.M.*, 100 Wn. App. 401, 411, 996 P.2d 1111 (2000); *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1993).

An accused person has an "unqualified right" to have the jury instructed on applicable lesser-included offenses. RCW 10.61.010; RCW 10.61.003; *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984) (Parker I) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). Defense counsel's deficient performance prejudices the accused if it causes him/her to waive rights based on misinformation. *See e.g. A.N.J.*, 168 Wn.2d at 116; *S.M.*, 100 Wn. App. at 412; *Stowe*, 71 Wn. App. at 188.

The first degree burglary statute criminalizes burglary when, *inter alia*, the accused assaults a person while in the building. RCW 9A.52.020. The accused does not have to be convicted of assault in order to be convicted of first degree burglary. RCW 9A.52.020; *see also State v. Vahey*, 49 Wn. App. 767, 746 P.2d 327 (1987) *overruled on other grounds as recognized by State v. Wilson*, 113 Wn. App. 122, 133, 52 P.3d 545 (2002).

Here, defense counsel misled Ms. Hutchens into believing that she could not be convicted of first degree burglary if she was acquitted of assault. RP 547-69. Ms. Hutchens relied on the misinformation to forego her unqualified right to have the jury instructed on the lesser-included offense of fourth degree assault. *Kyllo*, 166 Wn.2d at 862. Ms.

Hutchens intended to request a lesser-included instruction until her defense attorney gave her inaccurate legal advice. RP 483-84; CP 241-42.

Counsel's failure to adequately research the issue before advising his client fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. There is a reasonable probability that Ms. Hutchens would have asserted her right to the lesser-included instruction absent counsel's inaccurate advice.[4] *Kyllo*, 166 Wn.2d at 862. Indeed, the initial defense strategy involved seeking conviction of the lesser charge. RP 483-84; CP 241-42.

Defense counsel provided ineffective assistance. Counsel misled Ms. Hutchens about the law, and she relied on that misinformation to waive her right to instruction on a lesser-included offense. *Kyllo*, 166 Wn.2d at 862. Ms. Hutchens's assault conviction must be reversed. *Id.*

II. THE COURT'S SELF-DEFENSE INSTRUCTIONS DID NOT MAKE THE STANDARD MANIFESTLY CLEAR TO THE AVERAGE JUROR.

A. Standard of Review.

Jury instructions are reviewed *de novo* in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62,

[4] Additionally, Ms. Hutchens presented evidence that Earnhardt's fracture could have been the result of a previous injury. RP 244, 495. A rational jury could have disbelieved that Ms. Hutchens caused the substantial bodily harm necessary for second degree assault and convicted her instead of fourth degree assault. There is a reasonable

284 P.3d 378 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013).

B. The court erred by refusing to instruct the jury that Ms. Hutchens had no duty to retreat.

An accused person is entitled to have the jury instructed on the defense theory of the case. U.S. Const. Amend. XIV;[5] *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 116 (2010). Failure to so instruct is reversible error. *Id.*

Jury instructions on self-defense must do more than adequately set forth the law, they "must make the relevant legal standard manifestly apparent to the average juror." *McCreven*, 170 Wn. App. at 462 (internal citations omitted). Instructions that fail to make the standard clear are presumed prejudicial. *Id.*

In Washington, a person who believes she is being attacked has no duty to retreat. She is entitled to use force in self-defense. *State v. Jordan*, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010).

There is a pattern jury instruction explaining this rule:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that *[he][she]* is being attacked to stand *[his][her]* ground and defend against such attack by the use of lawful force.

---

probability that defense counsel's deficient performance affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862.

[5] *See also* Wash. Const. art. I, § 3.

> *[The law does not impose a duty to retreat.][Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."]*

WPIC 17.05.

To be complete, the instruction must include one of the bracketed alternatives in the second paragraph. Comment to WPIC 17.05.

It is reversible error for a court to fail to give this instruction when the evidence supports it. *State v. Redmond*, 150 Wn.2d 489, 493-95, 78 P.3d 1001 (2003). This is so regardless of the strength of the self-defense claim. *Id.* at 495.

The instruction is necessary in any case in which "a jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense." *Id.* at 495. The instruction is particularly crucial when the prosecutor argues in closing that the accused had an opportunity to flee from assault by the alleged victim. *Id.* at 494 n. 3.

The trial court erred by refusing to instruct the jury that Ms. Hutchens had no duty to retreat. The jury could have concluded that Ms. Hutchens's actions were not necessary because she could have walked away after being assaulted by Earnhardt. The prosecutor exacerbated this risk by arguing in closing that Ms. Hutchens should have "turned the other cheek" and simply removed herself from the situation. RP 581-82; 593.

Ms. Hutchens was entitled to an instruction informing the jury that she did not have a duty to retreat. *Redmond*, 150 Wn.2d at 493-95.

The state cannot overcome the presumption of prejudice in this case. *McCreven*, 170 Wn. App. at 462. The prosecutor argued that Ms. Hutchens's use of force was not necessary because she could have withdrawn herself from the interaction. RP 581-82; 593. Absent an instruction on the no-duty-to-retreat rule, the jury likely believed that they were required to convict Ms. Hutchens if they found she could have removed herself from the situation.

The court erred by refusing to instruct the jury that Ms. Hutchens had not duty to retreat. *Redmond*, 150 Wn.2d at 493-95. Ms. Hutchens's convictions must be reversed. *Id.*

III. THE COURT ORDERED MS. HUTCHENS TO PAY THE COST OF HER COURT-APPOINTED ATTORNEY IN VIOLATION OF HER RIGHT TO COUNSEL.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014).

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).[6] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[7]

---

[6] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

[7] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (Parker II) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (Fleming II) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000)

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenged to LFOs. *Id.* Those cases do not govern Ms. Hutchens's claim that the court lacked constitutional and statutory authority.

C. The court violated Ms. Hutchens's right to counsel by ordering her to pay the cost of her court-appointed attorney without finding that she had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d

(examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

642 (1974). Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCWA 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[8] *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court

[8] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id*. The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation…. [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present

or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.[9]

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, the lower court ordered Ms. Hutchens to pay $1000 in fees for her court-appointed attorney without finding that she had the present or future ability to pay. CP 354, 356.

The court violated Ms. Hutchens's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first determining whether she had the ability to do so.

[9] *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Fuller, 417 U.S. at 53. The order requiring Ms. Hutchens to pay $1000 in attorney fees must be vacated. *Id*

CONCLUSION

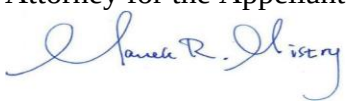
Ms. Hutchens's convictions must be reversed. She received ineffective assistance of counsel when her attorney gave her legal misinformation causing her to forego her right to have the jury instructed on an applicable lesser-included offense. The court also erred by refusing to instruct the jury that Ms. Hutchens had no duty to retreat rather than defending herself.

In the alternative, the order requiring Ms. Hutchens to pay $1000 in attorney's fees must be vacated. The court violated her right to counsel by ordering her to pay the cost of her court-appointed attorney without finding whether she had the ability to do so.

Respectfully submitted on July 29, 2014,

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

_____

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Sonja Hutchens, DOC #333520
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 29, 2014.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant